

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

STEPHANIE HOLDEN,
Plaintiff,

Civil No. 04-6271-AA
OPINION AND ORDER

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,
Defendant.

Mark Manning
Cram, Harder, Wells & Baron, P.C.
474 Willamette, Suite 200
Eugene, Oregon 97401
Attorney for plaintiff

Karin Immergut
United States Attorney
District of Oregon
Craig Casey
Assistant United States Attorney
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

Richard Rodriguez
Special Assistant United States Attorney
Office of General Counsel
Social Security Administration
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
Attorneys for defendant

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1 AIKEN, Judge:

2 Claimant, Stephanie Holden, brings this action pursuant to
3 the Social Security Act (the Act), 42 U.S.C. § 405(g) and § 1383
4 ©)(3), to obtain judicial review of a final decision of the
5 Commissioner. The Commissioner denied plaintiff's application
6 for Disability Insurance Benefits (DIB) under Title II of the
7 Social Security Act. 42 U.S.C. §§ 401-34. For the reasons set
8 forth below, the Commissioner's decision is reversed and remanded
9 for payment of benefits.

10 PROCEDURAL BACKGROUND

11 Plaintiff applied for Disability Insurance Benefits on
12 September 25, 2002, alleging disability as of May 1, 2002. Tr.
13 57-59. She alleged disability due to multiple orthopaedic
14 impairments as well as mental health impairments. Tr. 171.
15 Plaintiff's application was denied initially and on
16 reconsideration. Tr. 40-44, 47-50. A hearing was held before an
17 Administrative Law Judge (ALJ) on January 7, 2004. Tr. 404-447.
18 The ALJ issued an unfavorable decision on May 27, 2004, ruling
19 that plaintiff was not disabled because she could work as a
20 cashier or administrative support addresser. Tr. 13-23. The
21 Appeals Council denied plaintiff's request for review, making the
22 ALJ's decision the final decision of the Commissioner. Tr. 5-7.
23 See 20 C.F.R. §§ 404.981, 416.1481.

24 STATEMENT OF THE FACTS

25 Plaintiff was forty-three years old at the time of the
26 hearing. She completed high school and two years of nursing
27 school to become a registered nurse. She has past work
28 experience as a general duty nurse and a waitress. Plaintiff

1 alleges she is unable to work due to limitations caused by
2 multiple orthopaedic impairments as well as mental health
3 impairments. The relevant medical evidence is discussed below.

4 STANDARD OF REVIEW

5 This court must affirm the Secretary's decision if it is
6 based on proper legal standards and the findings are supported by
7 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
8 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
9 mere scintilla. It means such relevant evidence as a reasonable
10 mind might accept as adequate to support a conclusion."
11 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
12 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
13 The court must weigh "both the evidence that supports and
14 detracts from the Secretary's conclusions." Martinez v. Heckler,
15 807 F.2d 771, 772 (9th Cir. 1986).

16 The initial burden of proof rests upon the claimant to
17 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
18 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
19 an "inability to engage in any substantial gainful activity by
20 reason of any medically determinable physical or mental
21 impairment which can be expected . . . to last for a continuous
22 period of not less than 12 months. . . ." 42 U.S.C.
23 § 423(d)(1)(A).

24 The Secretary has established a five-step sequential
25 process for determining whether a person is disabled. Bowen v.
26 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
27 416.920. First the Secretary determines whether a claimant is
28 engaged in "substantial gainful activity." If so, the claimant

1 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
2 §§ 404.1520(b), 416.920(b).

3 In step two the Secretary determines whether the claimant
4 has a "medically severe impairment or combination of
5 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
6 §§ 404.1520(c), 416.920(c). If not, the claimant is not disabled.

7 In step three the Secretary determines whether the
8 impairment meets or equals "one of a number of listed impairments
9 that the Secretary acknowledges are so severe as to preclude
10 substantial gainful activity." Id.; see 20 C.F.R.
11 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
12 presumed disabled; if not, the Secretary proceeds to step four.
13 Yuckert, 482 U.S. at 141.

14 In step four the Secretary determines whether the claimant
15 can still perform "past relevant work." 20 C.F.R.
16 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
17 disabled. If she cannot perform past relevant work, the burden
18 shifts to the Secretary.

19 In step five, the Secretary must establish that the
20 claimant can perform other work. Yuckert, 482 U.S. at 141-42;
21 see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the
22 Secretary meets this burden and proves that the claimant is able
23 to perform other work which exists in the national economy, she
24 is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

25 Here, the ALJ found at step one that the plaintiff had not
26 engaged in substantial gainful activity since her alleged
27 disability onset date. Tr. 14, 21, Finding 2.

28 At step two, the ALJ found that plaintiff had the following

1 severe impairments: fibromyalgia, left wrist carpal tunnel
2 syndrome, and affective disorder. Tr. 15, 22, Finding 3.

3 At step three, the ALJ found that plaintiff's impairments
4 did not meet or equal the requirements of a listed impairment.
5 Tr. 15, 22, Finding 4. These findings, at Steps One through
6 Three, are not in dispute.

7 The ALJ next determined that the plaintiff had the residual
8 functional capacity to perform sedentary work with the following
9 limitations: occasionally stoop, kneel, crouch, crawl, reach in
10 all directions, and climb stairs or ramps; avoid balancing and
11 climbing ropes, ladders, and scaffolds; avoid concentrated
12 exposure to extreme heat, cold, noise, vibration, environmental
13 irritants, hazards, and loud noises. Tr. 20, 22, Finding 6. The
14 ALJ further determined that plaintiff had moderate mental
15 limitations in her ability to: execute detailed instructions;
16 accept instructions from and respond appropriately to
17 supervisors; interact with the general public; and work in
18 proximity to others without being distracted by them. Id. This
19 finding is in dispute.

20 At step four, the ALJ found that plaintiff was not able to
21 perform her past relevant work. Tr. 20, 22, Finding 7. This
22 finding is not in dispute.

23 At step five, the ALJ found that, based on the above
24 residual functional capacity, plaintiff could perform work
25 existing in significant numbers in the national economy;
26 specifically noting the positions identified by the vocational
27 expert: check/cashier and administrative support addresser. Tr.
28 21, 22, Finding 11. This finding is in dispute.

1 Plaintiff alleges that the ALJ erred by improperly
2 discrediting plaintiff's physicians, improperly discrediting
3 plaintiff's testimony, and improperly discrediting lay witness
4 testimony.

5 DISCUSSION

6 Plaintiff argues that the ALJ's decision to discredit the
7 opinions of plaintiff's treating physicians is not supported by
8 substantial evidence and is based on improper legal standards.
9 The defendant argues that the court should defer to the ALJ's
10 rational interpretation of conflicting evidence. See Batson v.
11 Comm'r. of Soc. Sec. Admin., 359 F.3d 1190, 1193 (9th Cir. 2004);
12 Morgan v. Comm'r. of Soc. Sec. Admin., 169 F.3d 595, 601 (9th Cir.
13 1999).

14 Treating physicians are employed to cure and have greater
15 opportunity to know and observe their patients; as such their
16 opinions are given greater weight than opinions of other
17 physicians. Rodriguez v. Bowen, 876 F.2d 759, 761-62 (9th Cir.
18 1989). The ALJ may reject the contradicted medical opinions of
19 treating physicians if the ALJ "makes findings setting forth
20 specific and legitimate reasons for doing so that are based on
21 substantial evidence in the record." Magallenes v. Bowen, 881
22 F.2d 747, 751 (9th Cir. 1989). Substantial evidence may include
23 a non-examining physician's opinion if the opinion is consistent
24 with other independent evidence in the record. Lester v. Chater,
25 81 F.3d 821, 830-31. (9th Cir. 1996).

26 I. DR. MORRIS' OPINION

27 The ALJ discredited the opinion of plaintiff's pain
28 management specialist, Dr. Morris, who found that plaintiff was

1 disabled. Dr. Morris opined that plaintiff was prevented from
2 working a regular schedule and standing two hours during an
3 eight-hour day. Tr. 318. The ALJ found that Dr. Morris' opinion
4 was not substantiated by objective clinical diagnostic evidence
5 and physical findings. Tr. 18. Dr. Morris' opinion also was
6 contradicted by the state's non-examining physicians, who found
7 plaintiff capable of sedentary work. Tr. 20, 266-276.

8 Dr. Morris diagnosed plaintiff with chronic regional pain
9 syndrome in the lower extremity, myofascial pain syndrome, rule
10 out fibromyalgia, depression, and anxiety. Tr. 333. Dr. Morris
11 opined that plaintiff would miss more than two days of work per
12 month due to flares of her condition. Tr. 318. The ALJ agreed
13 with Dr. Morris' diagnosis of fibromyalgia, but found that Dr.
14 Morris' disability opinion was unsupported by objective findings.
15 Tr. 15, 18. The ALJ's finding was based on three main factors:
16 plaintiff reported that her pain was moderate at the time of her
17 office visits, she had good range of motion and muscle strength,
18 and she was able to ride horses and walk at various times
19 throughout the week. Tr. 17-18. I disagree, and note that
20 objective findings by Dr. Morris support his conclusion that
21 plaintiff was unable to sustain sedentary work. Further, the ALJ
22 failed to provide proper reasons to discredit Dr. Morris'
23 opinion.

24 The ALJ's finding was based in part on plaintiff's reports
25 of only mild to moderate pain at the time of her doctor
26 appointments. Tr. 17. Plaintiff, however, reported that her
27 pain fluctuated: her worst pain was nine on a scale of one to
28 ten, her lowest pain was a three on the scale of ten, and her

1 sleep was often disrupted. Plaintiff's Memo p. 3, 6. Tr. 331,
2 332. Dr. Morris found a range of ten to fourteen of eighteen
3 tender points to be positive, and also noted positive Tinel's at
4 the carpal tunnel ligaments. Tr. 312, 316, 324, 326, 333, 383.
5 These findings by Dr. Morris support plaintiff's contention that
6 she experienced pain. The fact that plaintiff's pain happened to
7 be lower at the time of her appointments is not substantial
8 evidence that plaintiff's pain was not high enough to prevent her
9 from maintaining regular employment.

10 The ALJ also found that Dr. Morris' disability opinion was
11 unsubstantiated because plaintiff had good range of motion and
12 muscle strength. Tr. 17. Fibromyalgia, however, causes pain
13 throughout a person's body, which may limit their ability to
14 perform even the demands of sedentary employment. See Benecke v.
15 Barnhart, 359 F.3d 587, 594 (9th Cir. 2004). Having a good range
16 of motion and muscle strength is not substantial evidence that a
17 person with fibromyalgia is able to hold sustained employment.

18 The ALJ also relied on plaintiff's report that she could
19 walk 45 minutes or ride horses a few times per week as
20 substantial evidence to discredit Dr. Morris' opinion that
21 plaintiff was disabled. Tr. 17-18. The fact that plaintiff took
22 advantage of opportunities to engage in her hobbies when her pain
23 had lessened does not necessarily mean she could function at work
24 on a regular schedule. This issue will be covered in more detail
25 below in the discussion of plaintiff's credibility. This fact is
26 not substantial evidence to discredit Dr. Morris' opinion that
27 plaintiff was prevented from working a regular schedule and
28 standing two hours during an eight-hour day.

1 II. PLAINTIFF'S CREDIBILITY

2 The Commissioner asserts that Dr. Morris based his
3 disability finding largely on plaintiff's subjective reports, and
4 that the ALJ properly found these reports not credible.
5 Defendant's Brief, p. 12. A physician's opinion of disability
6 "premised to a large extent upon the claimant's own accounts of
7 his symptoms and limitations" may be disregarded where those
8 complaints have been "properly discounted." Morgan, 169 F.3d at
9 602. (internal citation omitted). An ALJ must engage in a two-
10 step analysis when considering a claimant's subjective symptom
11 testimony. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996).
12 First, a claimant must produce objective medical evidence of an
13 underlying impairment that could reasonably be expected to
14 produce some degree of symptom. Id. at 1281-82. Second, if the
15 claimant produces such evidence, and if the record lacks evidence
16 of malingering, an ALJ may find a claimant not entirely credible
17 by giving specific, clear, and convincing reasons. Id. at 1283-
18 84.

19 Plaintiff has produced objective evidence of an impairment
20 that could produce symptoms resulting in limitations of her
21 mental and physical capacity. The ALJ did not find that
22 plaintiff was malingering. Therefore, the analysis moves to a
23 credibility determination.

24 An ALJ may discredit a claimant's subjective complaints
25 only by making specific findings and stating clear and convincing
26 reasons for doing so. Dodrill v. Shalala, 12 F.3d 915, 918 (9th
27 Cir. 1993). One way to do this is by identifying inconsistencies
28 between the complaints and activities of daily living. Thomas v.

1 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). The ALJ found
2 that plaintiff was not credible because she took part in
3 activities that contradicted her subjective complaints of pain
4 and disability: cooking, shopping, housekeeping, redecorating,
5 home schooling her daughter, driving, and caring for her horses.
6 Tr. 18

7 These activities, however, are not inconsistent with
8 plaintiff's subjective complaints; plaintiff contends that her
9 pain fluctuated and she tried to do what she could to help around
10 the house at the times when her pain was lessened. Tr. 344, 427-
11 428. The ability to participate in some daily activities is not
12 inconsistent with disability under the Social Security Act.
13 Reddick v. Chater, 157 F.3d 715, 724 (9th Cir. 1998). See also
14 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989) ("Many home
15 activities are not easily transferable to ... the more grueling
16 environment of the workplace, where it might be impossible to
17 periodically rest or take medication.")

18 Plaintiff reported that she was limited in her ability to
19 do these activities; for example, plaintiff home schooled her
20 daughter, but often did so while bedridden. Tr. 425. She also
21 reported that she needed progressively more help from other
22 family members in activities such as cooking, cleaning, shopping,
23 and driving. Tr. 344, 427-428. She reported that she could do
24 little during the bathroom redecoration besides some painting
25 with her right hand, and she was unable to do this for very long.
26 Tr. 430. Plaintiff also testified that she had limited
27 interaction with her horses due to pain and usually could only
28 spend one hour with them before she would need to leave, but that

1 her horses were important to her and she tried to spend time with
2 them when she could. Tr. 424, 431. She also reported that she
3 could not ride anymore without falling off. Tr. 432.
4 Plaintiff's attempts to engage in her hobbies or contribute to
5 household chores as much as possible are not clear and convincing
6 reasons for the ALJ to draw an adverse inference as to
7 plaintiff's credibility regarding her limitations.

8 The Commissioner states that there is no objective evidence
9 to support plaintiff's statements about her limitations. The
10 Commissioner acknowledges that an ALJ may not base his
11 credibility determination solely on a lack of objective evidence,
12 so that even if the ALJ found no objective evidence, that fact
13 still would not be dispositive. Bunnell v. Sullivan, 947 F.2d
14 341, 345 (9th Cir. 1991). Regardless, I find some objective
15 evidence to support plaintiff's credibility and statements about
16 her limitations.

17 The Commissioner states that the lack of objective evidence
18 of plaintiff's limitations includes plaintiff's negative back x-
19 ray. Contrary to the Commissioner's assertion, however, there
20 was evidence of a sprain of plaintiff's back, supporting her
21 contention of pain. Tr. 18. The ALJ noted that plaintiff was
22 not walking with a limp on May 13, 2002 as further evidence that
23 plaintiff was not in pain. Tr. 17. However, Dr. Emory,
24 plaintiff's primary care physician, noted that plaintiff was
25 walking with a limp on June 4, 2002. Tr. 188. The fact that
26 plaintiff did not always have a limp is consistent with her
27 description of pain that "waxes and wanes." Tr. 316. The
28 Commissioner argues that Dr. Cutler's records indicated that

1 plaintiff's carpal tunnel syndrome was improving, but Dr. Cutler
2 recommended surgery even after her grip strength improved. Tr.
3 17, 403. Dr. Lockfeld also found evidence of carpal tunnel
4 syndrome, as well as "typical myofascial tender points." Tr.
5 291. The Commissioner stated that plaintiff required no
6 emergency pain treatment, but plaintiff visited the emergency
7 room on 5/11/02 due to heel pain. Tr. 222-23. Also, both Drs.
8 Morris and Lockfeld found that plaintiff had diminished pinprick
9 sensation in her left foot. Tr. 297, 312. These are all
10 examples of objective evidence to support plaintiff's credibility
11 and statements about her limitations.

12 The Commissioner argues that there is evidence that
13 plaintiff exaggerated her limitations, and this evidence supports
14 the ALJ's determination that plaintiff was not credible.

15 In determining that plaintiff was not credible, the ALJ
16 relied heavily on Dr. Lockfeld's observation that there may have
17 been "some degree of embellishment present" during plaintiff's
18 visit. Tr. 18-19. However, Dr. Lockfeld also reportedly found
19 evidence of carpal tunnel syndrome, noted that "typical
20 myofascial tender points" were present, suggested that plaintiff
21 may have chronic fatigue syndrome, and ordered more tests to rule
22 out a neurologic lesion. Tr. 295-299. Also, there were no
23 suggestions from any other treating physicians that plaintiff was
24 embellishing her symptoms. This one statement relied upon by the
25 ALJ is not clear and convincing evidence that the plaintiff is
26 not credible.

27 Finally, the Commissioner argues that evidence that
28 plaintiff had a pecuniary motive supports the ALJ's determination

1 that plaintiff was not credible. The Commissioner argues that
2 the plaintiff had secondary gain motives to receive Social
3 Security benefits, because she was stressed about bankruptcy and
4 her mortgage payment and requested that her physician complete a
5 disability form for the mortgage company. Tr. 187. However, by
6 definition, every claimant for Social Security benefits has clear
7 knowledge and intent for pecuniary gain. See Ratto v. Dept. of
8 Health and Human Services, 839 F. Supp 1415, 1428 (D. Or. 1993).
9 Here, plaintiff complained of pain symptoms months before asking
10 her physician to complete the disability form for the mortgage
11 company. Plaintiff's Reply p. 7; Tr. 189. The fact that
12 plaintiff would receive a suspension of her mortgage payments if
13 found to be disabled is not a clear and convincing reason to
14 discredit plaintiff's testimony.

15 An award of benefits is appropriate when: (1) the ALJ
16 failed to give legally sufficient reasons for rejecting evidence;
17 (2) no outstanding issues remain; and (3) it is clear the ALJ
18 would be required to award benefits when the improperly rejected
19 evidence is credited. Harman v. Apfel, 211 F.3d 1172, 1178 (9th
20 Cir. 2000), cert. denied, 531 U.S. 1038 (2000). Because the ALJ
21 improperly rejected evidence that would have required an award of
22 benefits, this court finds an award of benefits is appropriate.

23 The ALJ failed to give legally sufficient reasons for
24 discrediting plaintiff's testimony. Because plaintiff's
25 complaints were improperly discounted, the ALJ erred in
26 disregarding Dr. Morris' opinion, which relied in part on
27 plaintiff's testimony. The ALJ also erred in disregarding Dr.
28 Morris' opinion because the opinion was supported by objective

1 diagnostic evidence.

2 No outstanding issues remain in plaintiff's case, and when
3 the improperly rejected evidence is credited it establishes
4 plaintiff is disabled and entitled to benefits. The vocational
5 expert testified that Dr. Morris' opinion, if credited, would
6 find plaintiff disabled and unable to work; this finding requires
7 the ALJ to award benefits. Tr. 445. Because the criteria of
8 Harmon v. Apfel is met, this court finds that an award of
9 benefits is appropriate.

10 Moreover, because the error found by this court allows a
11 reversal of the ALJ's decision, the court declines to address
12 plaintiff's other allegations of error.

13 **CONCLUSION**

14 The Commissioner's decision is not based on substantial
15 evidence, and is therefore reversed and remanded for payment of
16 benefits.

17 IT IS SO ORDERED.

18 Dated this 28 day of May 2005.

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22 _____
23 Ann Aiken
24 United States District Judge
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